

**PLACER COUNTY SUPERIOR COURT
CIVIL LAW AND MOTION TENTATIVE RULINGS
FRIDAY, OCTOBER 23, 2020, AT 8:30 A.M.**

These are the tentative rulings for civil law and motion matters set at **8:30 a.m., Friday, October 23, 2020**. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by **4:00 p.m., Thursday, October 22, 2020**. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

Except as otherwise noted, these tentative rulings are issued by the **HONORABLE MICHAEL W. JONES** and if oral argument is requested, it will be heard in Department 3, located at 101 Maple Street, Auburn, California.

PLEASE NOTE: TELEPHONIC APPEARANCE IS STRONGLY ENCOURAGED FOR ALL CIVIL LAW AND MOTION MATTERS. (Emergency Local Rule 10.28; see also Local Rule 20.8.) More information is available at the court's website: www.placer.courts.ca.gov.

1. M-CV-0076919 Jalgunas, JoAnn V. vs. Rodrigues, Stephanie A.

Plaintiff's request for judicial notice is granted.

Defendant Stephanie Rodrigues's motion to set aside default is denied.

Defendant moves to set aside the default entered against her on September 15, 2020, on the grounds that she was not personally served as stated in the proof of service filed in conjunction with the request to enter default. Filing of a proof of service that complies with statutory standards creates a rebuttable presumption that service was proper. *Floveyor Int'l, Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795. In response to defendant's motion and supporting declaration denying service, plaintiff submits the declarations of process server Elizabeth Fleischer, co-tenant John Cronin, and plaintiff JoAnn Jalgunas. Each of these individuals confirm under penalty of perjury based on their personal observation that Ms. Fleischer handed the documents in question to defendant at the subject residence on September 4, 2020, as reflected in the proof of service of summons. Based on consideration of the evidence in support of and in opposition to the motion, the court finds that defendant fails to rebut the presumption of proper service.

The court notes that defendant was given leave to file a reply to plaintiff's opposition by 12:00 p.m. on October 21, 2020. Defendant did not file a reply, but did file an answer to the complaint. The answer was mistakenly filed by the clerk despite the fact that defendant remains in default. Plaintiff's objection to the answer is sustained and the answer filed October 21, 2020, is stricken.

2. S-CV-0039740 Carlson, Don L. vs. Coldwell Solar, Inc., et al

Appearance required on October 23, 2020, at 8:30 a.m. in Department 3.

3. S-CV-0039929 Jarvis, Todd Henry vs. Calder, Robin Elizabeth

Defendant's request for judicial notice is granted.

Defendant Robin Calder's motion for an order extending the time in which to object to notice to appear at trial is granted. Pursuant to Code of Civil Procedure section 1987(c), the court will permit defendant to serve a further objection to Request No. 23 to the notice to appear at issue. The court takes no position at this time as to whether, and to what extent, defendant has waived the tax return privilege.

4. S-CV-0040085 Leith, Thomas S. vs. Berthel, Fisher & Co. Financial Svcs., Inc.

Defendant Berthel Fisher & Co. Financial Services, Inc. ("Berthel") demurs to plaintiffs' first amended complaint.

A party may demur where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The allegations in the pleadings are deemed true no matter how improbable they may seem. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.

Plaintiffs allege claims of fraud-intentional misrepresentation, negligent misrepresentation, fraud-omission, professional negligence, and breach of fiduciary duty, arising out of investments purchased through Berthel's registered representative Shawn Davis ("Davis") between 2005 and 2010. Berthel argues that each of plaintiffs' claims are barred by the applicable statute of limitations.

Plaintiffs allege that the subject investments were unsuitable for them based on their investment objectives, financial situation and needs. Thus the statute of limitations began to run when plaintiffs made the unsuitable investments and had possession of information disclosing the lack of suitability. *See WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 156. As parties agree that the applicable date for computing the statute of limitations is September 8, 2016, plaintiffs' claims which arise from investments purchased between 2005 and 2010 are barred by the applicable statute of limitations, unless an exception applies.

Plaintiffs invoke the “discovery rule”, which “postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” *Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 807. Under the discovery rule, the cause of action accrues when plaintiff suspects, or should suspect, that the injury was caused by wrongdoing, or once plaintiff has notice of circumstances that would put a reasonable person on inquiry. *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111. Plaintiffs relying on the discovery rule must plead “‘(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.’” *Fox v. Ethicon Endo–Surgery, Inc.*, *supra*, 35 Cal.4th at 808. However, where the parties are in a fiduciary relationship, “‘plaintiff’s burden of discovery is reduced, and he is entitled to rely on the statements and advice provided by the fiduciary.’” *Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, quoting *Sherman v. Lloyd* (1986) 181 Cal.App.3d 693, 698.

The court finds that plaintiffs’ first amended complaint alleges a sufficient basis to invoke the discovery rule as plaintiffs allege reliance on statements and advice provided by Davis while he was a registered representative of Berthel regarding the nature and suitability of the subject investments. Considering the allegations of the first amended complaint, the court is unable to conclude at this stage that plaintiffs were provided with information disclosing the unsuitability of the investments. Berthel suggests in a footnote that the court could take judicial notice of the contents of subscription agreements attached to an exhibit filed with respect to a different motion in the case, despite a prior ruling to the contrary. As no request for judicial notice has been filed with respect to the instant demurrer, the court has no cause to revisit its prior ruling.

Berthel also contends that plaintiffs’ duty of inquiry recommenced as a matter of law when Davis ceased acting as its registered representative. The cases cited by Berthel do not involve facts similar to the case at bar, where plaintiffs’ fiduciary relationship with their broker continued into 2016. *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509 specifically discussed statutory tolling under Code of Civil Procedure section 340.6, and is inapplicable to the facts of this case. Whether it was reasonable for plaintiffs to continue to rely on past representations by a fiduciary after the fiduciary relationship was terminated raises a question of fact that can not be resolved at this stage. *See Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 440; *see also Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921-922 (court erred in sustaining demurrer on statute of limitation grounds as to escrow agency where plaintiff alleged continued reliance on misrepresentations by co-defendants).

Finally, the court finds that the first amended complaint, read as a whole, alleges sufficient facts to support plaintiffs’ fraud claims. Berthel’s citation to *McGonigle v. Combs* (9th Cir. 1992) 968 F.2d 810 is unavailing as the first amended complaint does not allege violations of SEC Rule 10b-5.

Berthel shall file and serve its answer to the first amended complaint on or before November 13, 2020.

5. S-CV-0041807 Boyle, Barbara vs. County of Placer, et al

The demurrer to second amended complaint is continued to November 13, 2020, at 8:30 a.m. in Department 3.

6. S-CV-0041857 Trofholz Technologies, Inc. vs. Glen, Troy, et al

Plaintiff's Motion to Compel Compliance With Agreement to Produce Documents

Plaintiff's motion to compel compliance with agreement to produce documents is granted as prayed. Although defendants contend that a scheduled future production would moot the motion, the court has been given insufficient information to ascertain whether the production occurred as scheduled, and/or whether it sufficiently addressed the issues raised by plaintiff's motion. Defendants Intellect Group, LLC, Casey Clifford, Ali Dhue, and Troy Glenn shall produce documents in compliance with their prior agreement to produce on or before October 30, 2020.

Defendant's Motion to Compel Further Responses to Request for Production, Set One

Defendant Intellect Group, LLC's unopposed motion to compel further responses to request for production of documents, set one, is granted as prayed. Plaintiff shall serve further verified responses to defendant's request for production of documents, set one, and produce responsive documents, on or before October 30, 2020.

7. S-CV-0042417 Oxman, Cindy Ellen vs. Washington, Jillian Amber

Motion to Compel Answers to Form Interrogatories

Defendant's motion to compel answers to form interrogatories is granted. Plaintiff shall serve verified responses without objections to defendant's form interrogatories, set one, within 10 days of service of notice of entry of the court's order. Defendant's request for sanctions is denied as the motion was unopposed. Code Civ. Proc. § 2030.290(c). However, repeated conduct of failing to comply with discovery obligations may lead the court to find an abuse of the discovery process and award sanctions on that basis. *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, overruled on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.

Motion to Compel Answers to Special Interrogatories

Defendant's motion to compel answers to special interrogatories is granted. Plaintiff shall serve verified responses without objections to defendant's special interrogatories, set one, within 10 days of service of notice of entry of the court's order. Defendant's request for sanctions is denied as the motion was unopposed. Code Civ. Proc. § 2030.290(c). However, repeated conduct of failing to comply with discovery obligations may lead the court to find an abuse of the discovery process and award sanctions on that basis. *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231

Cal.App.3d 481, overruled on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.

Motion to Compel Answers to Demand for Production

Defendant's motion to compel answers to demand for production is granted. Plaintiff shall serve verified responses without objections to defendant's demand for production, set one, within 10 days of service of notice of entry of the court's order. Defendant's request for sanctions is denied as the motion was unopposed. Code Civ. Proc. § 2031.300(c). However, repeated conduct of failing to comply with discovery obligations may lead the court to find an abuse of the discovery process and award sanctions on that basis. *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, overruled on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.

8. S-CV-0042799 Wright, Shirley, et al vs. Likely Land & Livestock Co., Inc.

Defendants move for terminating sanctions, to compel plaintiffs' expert psychologist to produce test results to defendants' rebuttal expert, and for monetary sanctions.

Defendants' motion is denied.

Terminating sanctions are an extreme sanction for those cases where misuses of the discovery process are so pervasive that a less drastic sanction will not sufficiently address the discovery derelictions. *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796-797. In light of the extreme effect of terminating sanctions, courts do not impose such a sanction lightly. The sole basis for defendants' request for terminating sanctions is plaintiffs' counsel's failure to pay sanctions previously awarded by the court. This by itself is not a sufficient basis to impose terminating sanctions against plaintiffs.

Defendants' motion to compel the production of expert witness materials is denied as untimely. Code Civ. Proc. § 2024.030; *see also Cottini v. Enloe Med. Center* (2014) 226 Cal.App.4th 401, 420. Defendants' request for monetary sanctions is also denied.

Plaintiffs' request for sanctions is denied as the opposition does not identify the person, party and/or attorney against whom the sanctions are sought. See Code Civ. Proc. § 2023.040.

9. S-CV-0043541 Kowalski, Samantha vs. Workforce Software LLC

The motions to compel were dropped by the moving party.

10. S-CV-0044081 Linkugel, Ann Marie vs. Burgess, Matthew

The scheduled hearing is dropped as no moving papers were filed with the court.

11. S-CV-0044211 Systems Tech, Inc. vs. Swinerton Builders, et al

The motion to be relieved as counsel for plaintiff by Hanna C. Kreuser, Esq. and Porter Law Group, Inc. is granted, effective upon the filing of proof of service of the order after hearing on plaintiff Systems Tech, Inc. Counsel shall lodge an amended proposed order within five court days which reflects the next scheduled hearing date of December 8, 2020, at 11:30 a.m. in Department 40 for an order to show cause re status of stay.

12. S-CV-0044249 Roark, Russell vs. Murphy, Terry

The demurrer to first amended complaint is continued to November 13, 2020, at 8:30 a.m. in Department 3.

13. S-CV-0044553 Marquez, Ana, et al - In Re the Petition of

The petition to approve compromise of disputed claim of minor is granted as prayed. If oral argument is requested, appearance of the minor is excused.

14. S-CV-0044845 Galilei, Rouslana vs. Comcast Cable Communications, LLC

The motion to be relieved as counsel for plaintiff by Todd M. Friedman and the Law Offices of Todd M. Friedman, P.C., is granted, effective upon the filing of proof of service of the signed order after hearing on plaintiff Rouslana Galilei.

15. S-CV-0044861 Galilei, Rouslana vs. Sprint Solutions, Inc.

The motion to be relieved as counsel for plaintiff by Todd M. Friedman and the Law Offices of Todd M. Friedman, P.C., is granted, effective upon the filing of proof of service of the signed order after hearing on plaintiff Rouslana Galilei.

16. S-CV-0044985 Lor, Cha, et al vs. Duenas, Ami Barceliza

The court acknowledges plaintiffs' filing of a peremptory challenge to the Honorable Michael W. Jones pursuant to Code of Civil Procedure section 170.6. The motion to strike is continued to November 19, 2020, at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

17. S-CV-0045465 Bickerton, Kevin - In Re the Petition of

The petition to approve compromise of disputed claim of minor is granted as prayed. If oral argument is requested, appearance of the minor is excused.
